BRIEF IN SUPPORT OF PETITION.

Opinions Below.

No opinion was rendered by the District Court in this case. The opinion of the United States Circuit Court of Appeals for the First Circuit, dated April 24, 1944, is unreported, but appears in the Record at page 115.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended, 28 U. S. C. Section 347(a).

Statement of the Case.

The indictment in ten counts charges both defendants, doing business as co-partners under the name of the Hampden Beef Company in Springfield, Massachusetts, with ten alleged violations of the said Act and the said Regulations. During the trial verdicts were directed as to the defendant Goldberg on Counts 1, 3, 5, 6, 7, 8, 9, 10 and as to the defendant Zimberg on Counts 1, 3, 6, 7, leaving counts 2 and 4 against both defendants and counts 5, 8, 9, 10 against Zimberg only.

The defendants filed and argued a written motion to quash the indictment which was denied subject to their exception. The jury found Goldberg "guilty" on counts 2 and 4, found Zimberg "Not Guilty" on counts 2 and 4, but "Guilty" on counts 5, 8, 9, and 10.

During the trial various exceptions were saved to the exclusion or admission or refusal to strike out evidence; to the failure to give requested instructions to the jury and to the giving of allegedly erroneous instructions.

At the close of the prosecution and again at the close of all the evidence, the defendants presented written mo-

tions for directed verdicts which were denied subject to exceptions.

After the verdict the defendant Goldberg filed a motion for a new trial which was denied subject to exceptions.

Statement of Facts.

The defendants for several years prior to January 1, 1943 had been engaged as co-partners in the conduct of a wholesale meat business in Springfield, Massachusetts, employing some twenty-three in help. They were also stockholders, directors and officers with a third party of a corporation named Big Four, Inc., which conducted two retail concessions in stores located in Pittsfield and North Adams, Massachusetts. The prosecution contends that the indictment alleges that as co-partners the defendants sold beef at above ceiling prices to one Byron at the Hampden Beef Company shop in Springfield on January 5, and 13, 1943 (Counts 2 and 4); that the defendant Zimberg similarly sold beef to one Roy on January 7, 1943 (Count 5); and that Zimberg sold beef at above ceiling prices to the Big Four, Inc. at Pittsfield on January 16 and 26, 1943 and at North Adams on January 21, 1943 (Counts 8, 9, 10).

Specification of Errors.

The errors assigned are as set forth above in the Petition.

ARGUMENT.

1. The Trial Court erred in admitting testimony from the Government's only witness against the Defendant Goldberg on Counts 2 and 4.

Byron, a customer of the Defendants, testified that some time before Christmas, 1942, the "defendants" told him that hindquarters of beef were going to cost him thirty cents per pound; that he did not remember who sold him

the meat on January 5, 1943 (Count 2); or January 13, 1943 (Count 4) (R. 21-23); that it might have been any one of four people; that he did not weigh or see weighed the meat he then bought (R. 27). Subject to exceptions he was permitted to testify in contradiction of the written invoices (Exhibit 2)—which showed 184 pounds @ 25¼¢ per pound—and say that he was charged 30¢ per pound (R. 28-29).

Such testimony, prejudicial to Goldberg, should have been excluded.

2. The verdict of "guilty" as to Goldberg and "not guilty" as to Zimberg on Counts 2 and 4 were inconsistent and justice required a new trial thereon for Goldberg.

The testimony of Byron as above stated included both defendants as making the statement of future prices for beef. The jury acquitted Zimberg indicating its disbelief of Byron's testimony. Zimberg denied such a statement. Goldberg denied such statement and testified that he told Byron that the defendants were going out of business because meat could not be profitably sold for less than 30¢ per pound and the law prevented sales at such price (R. 69).

If the jury disbelieved Byron, such disbelief could not be capitalized into a conviction of Goldberg. Disbelief of Goldberg's testimony would be no evidence to the contrary and no corroboration of Byron.

Goldberg's motion for a new trial (R. 17) should, therefore, have been allowed.

3. The Trial Court erred when it neglected to instruct the jury to disregard certain prejudicial testimony of the Government's sole witness which, in the jury's absence from the courtroom, had been ordered stricken from the record—Counts 2 and 4.

Byron was also permitted, against exception, to testify with reference to Counts 2 and 4 that, in the absence of

Goldberg, he talked to Government agents in February, 1943 and told them that he paid 30¢ per pound for the meat in question (R. 21-23). Later, at the close of the evidence, in the absence of the jury, and upon motion of the defendant, the Court struck such testimony from the record, but upon the return of the jury the Court omitted—as also in his charge—to instruct the jury to disregard such testimony (R. 70).

The Government took no exception to the striking out of such testimony and such order thereby became the law of the case.

Commonwealth v. *Perry*, 248 Mass. 19, 27-28;
Newman v. *Newman*, 211 Mass. 508, 509-510;
See also *Clarke* v. *Fall River*, 219 Mass. 580 586.

4. The Government failed to sustain the burden of proof by failing to show the price charged for the beef, a necessary element of its case against Zimberg in Count 5.

The indictment in Count 5 charges the sale of a hindquarter weighing 102 pounds at 30 cents per pound. The only evidence offered by the government as to weight and price was contained in Exhibit 5 (R. 87), the invoice covering the transaction, which showed 153 pounds at 20 cents per pound. The weight alleged in Count 5 was apparently arrived at by the government or the grand jury by arbitrarily dividing $30.60 by 30 cents. There was no evidence from any source that the meat weighed 102 pounds or was priced at 30 cents per pound. The government's only witness, one Roy, the purchaser, testified that there was no talk of price with Zimberg or anybody else about price (R. 31). There was no evidence at any time of any talk between Roy and anybody else as to price.

5. The Trial Court erred in admitting the so-called "ledger sheets" against the defendant Zimberg on Counts 8, 9 and 10.

Against exception the Court permitted Government witness LaFrancois, the manager of a Pittsfield concession, the Big Four Inc., (not a defendant) to introduce a book which he kept voluntarily and into which he entered the amount and cost of goods received at such concession from sellers to the Big Four, Inc., including the defendants (R. 33-34). The book was no part of the accounting records of the defendants or of the Big Four, Inc. This book was in contradiction of invoices from the defendants and the books of account of both the defendants and the Big Four, Inc., in that the so-called "ledger" reported prices in excess of the ceiling whereas all of the other said records showed legal prices charged and paid as to the items covered by Counts 8 and 10.

Against exception the Trial Court permitted another concessionaire of the Big Four, Inc., at North Adams to introduce a similar ledger upon Count 9 (R. 45-46).

These so-called "ledgers" and their contacts should have been excluded on hearsay not affecting the defendant Zimberg.

Vicksburg & M. R. R. v. *O'Brien*, 119 U. S. 99;

Bates v. *Preble*, 151 U. S. 156-157;

Lewellyn v. *El Reduction Co.*, 275 U. S. 243, 247-248;

Shachoy v. *Chevrolet Motor Co.*, 280 Mass. 442, 445;

Klefbeck v. *Dous*, 302 Mass. 383, 389-390;

Gold v. *Marshall*, 260 Mass. 492, 493;

Mass. Gen. Laws, Chap. 233, Sec. 78, U. S. Code Ann., Title 28, S. 695.

Conclusion.

It is respectfully submitted that this case is one calling for the exercise by this Court of its appellate jurisdiction, and that to such end a writ of certiorari should issue to the Circuit Court of Appeals for the First Circuit.

Respectfully submitted,

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